Environmental Contractors, Inc., Kielczewski Corporation and their alter ego, single employer, and/or successor, BE Construction Corporation *and* Local 78, Laborers International Union of North America. Cases 22–CA–089865, 22–CA–136700, 22–CA–145173, and 22–CA–172957

March 19, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that Respondents Environmental Contractors, Inc., Kielczewski Corporation, and BE Construction Corporation (the Respondents) have failed to file an answer to the consolidated complaint and compliance specification. Upon charges filed by Local 78, Laborers International Union of North America (the Union) on September 12, 2014, January 23, 2015, and March 31, 2016, respectively, the General Counsel issued an Order Consolidating Complaint, Compliance Specification and Notice of Hearing (the consolidated complaint and compliance specification) on July 31, 2017, alleging that the Respondents had violated Section 8(a)(5) and (1) of the Act.[1] Respondents Environmental Contractors and Kielczewski Corporation did not file an answer. Respondent BE Construction filed an answer on August 14, 2017. By letter dated December 1, 2017, the Region informed BE Construction that its answer did not comply with the Board's Rules. Respondent BE Construction filed an amended answer on December 22, 2017, and a second amended answer on December 29, 2017. The General Counsel moved to strike portions of the second amended answer on December 29, 2017, arguing that those portions were deficient because they did not meet the requirements of the Board's Rules and Regulations. On January 8, 2018, Respondent BE Construction filed a motion to withdraw its second amended answer "and any other pleadings incident to the Consolidating [sic] Complaint and Compliance Specification," based on the statement of its president that continuing with this litigation was "practically and financially infeasible."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the consolidated complaint and compliance specification affirmatively stated that unless a timely answer was received on or before August 21, 2017,[2] the Board may find, pursuant to a motion for default judgment, that the allegations in the consolidated complaint and compliance specification are true. Nevertheless, Respondents Environmental Contractors and Kielczewski Corporation did not file an answer, and Respondent BE Construction withdrew its second amended answer and "any other pleadings," i.e., its initial and amended answers. The withdrawal of an answer has the same effect as a failure to file an answer: the allegations in the complaint and compliance specification will be taken as true. See *Maislin Transport*, 274 NLRB 529 (1985).[3]

On January 19, 2018, the General Counsel filed with the National Labor Relations Board a Motion to Transfer and Continue Case before the Board and Motion for Default Judgment. On January 24, 2018, the Board issued a Notice to Show Cause stating that "any party seeking to show cause why the General Counsel's motion should not be granted must do so . . . on or before February 7, 2018." The Respondents did not file a response to the Notice to Show Cause.

In the absence of good cause being shown for the failure to file an answer to the consolidated complaint and

[1] The compliance specification also encompasses the unfair labor practices found by the Board in *Environmental Contractors, Inc.,* Case 22–CA–089865 (2014) (unpublished), enfd. sub nom. *NLRB v. Environmental Contractors, Inc.* and *Kielczewski Corp*., alter egos and a single employer, Case 14–2815 (3d Cir. July 3, 2014).

[2] Subsequently, by letter dated December 1, 2017, the General Counsel gave the Respondents until December 15, 2017, to file a timely answer.

[3] In a statement accompanying the withdrawal of its second amended answer, Respondent BE Construction stated that it "has found it practically and financially infeasible to continue with the . . . litigation." Even were the Board to consider this statement a response to the consolidated complaint and compliance specification, "Respondent's financial situation does not constitute good cause for failure to file an answer, nor is it otherwise a basis for denying the General Counsel's [m]otion . . . ." *Judd Contracting, Inc*., 338 NLRB 676, 676 fn. 3 (2002) (granting summary judgment where respondent failed to file an answer to compliance specification), enfd. 76 Fed. Appx. 651 (6th Cir. 2003); see also *Goudreau Corp*., 314 NLRB No. 44, slip op. at 1 (1994) (in a compliance proceeding, the issue is the amount due and not the respondent's ability to pay).

compliance specification, we deem the allegations in the consolidated complaint and compliance specification to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

JURISDICTION

At all material times, the Respondents have been corporations with an office and a place of business in West Orange, New Jersey (the Respondents' facility), and have been contractors in the construction industry performing residential and commercial demolition, asbestos abatement, and mold and lead removal. At all material times, the Respondents have had substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.

About December 13, 2013, Respondent BE Construction was established by Respondent Kielczewski as a disguised continuation of Respondent Kielczewski for the purpose of evading its responsibilities under the Act. Based on the operations and conduct described above, Respondent Kielczewski and Respondent BE Construction are, and have been at all material times, alter egos and a single employer within the meaning of the Act. At all material times, the Respondents have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have interrelated operations with common administration, equipment, purchasing and sales; and have held themselves out to the public as a single integrated business enterprise. Based on the operations described above, the Respondents constitute a single integrated business enterprise and a single employer within the meaning of the Act.

In conducting their operations described above, during the 12-month period ending June 1, 2017, the Respondents performed services valued in excess of $50,000 in states outside the State of New Jersey.

We find that at all material times, the Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following employees of the Respondents constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time building and construction laborers employed by the Employer in the State of New Jersey, but excluding all office clerical employees, managers, guards and supervisors as defined in the Act.

On April 23, 2012, the Board certified the Union as the exclusive collective-bargaining representative of the unit. At all times since about April 23, 2012, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On January 13, 2014, Administrative Law Judge Steven Davis issued a Decision and Order in Case 22–CA–089865, finding that Respondent Environmental Contractors and Respondent Kielczewski were alter egos and a single employer and that Respondent Kielczewski was a disguised continuance of Respondent Environmental Contractors, established to evade its responsibilities under the Act. Judge Davis also found that Respondent Environmental Contractors and Respondent Kielczewski violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by reducing the wages and benefits of unit employees without providing the Union notice and an opportunity to bargain over the changes. On February 27, 2014, the Board adopted Judge Davis's Decision and Order in the absence of exceptions. On July 3, 2014, the United States Court of Appeals for the Third Circuit enforced the Board's Order in *National Labor Relations Board v. Environmental Contractors, Inc.* and *Kielczewski Corp.,* alter egos and a single employer, Case 14-2815 (3d Cir. July 3, 2014).

About June 16, 2014, the Union again requested that the Respondents recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about June 16, 2014, the Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

Since about March 1, 2014, the Respondents have changed the wages and benefits of the unit employees by reducing their wages and benefits without notice to the Union and without affording the Union an opportunity to bargain with the Respondents.[4]

[4] The complaint alleges a change in wages and benefits on about March 1, 2014, more than 6 months before the filing of the charge. However, the 6-month limitations period in Sec. 10(b) of the Act is an affirmative defense that is waived if not timely raised. See, e.g., *Newspaper & Mail Deliverers (New York Post)*, 337 NLRB 608, 609 (2002) (citing *Public Service Co*., 312 NLRB 459, 461 (1993)). As the Respondents have failed to file an answer to the complaint or a response to the notice to show cause and have failed to raise a 10(b) defense, we find the violations as alleged and shall issue an appropriate remedial order. See, e.g., *Malik Roofing Corp*., 338 NLRB 930, 931 fn. 3

Since about November 17, 2014, the Union has requested, orally and in writing, that the Respondents furnish it with payroll and financial information necessary to conduct a payroll audit. The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about December 26, 2014, the Respondents, by Respondent Kielczewski's president, Slawomir Kielczewski, in writing, have failed and refused to furnish the Union with the requested information.

About January 1, 2014, Respondent BE Construction purchased the business of Respondent Kielczewski, and since that date has continued to operate the business of Respondent Kielczewski in basically unchanged form and has employed as a majority of its employees individuals who were previously employees of Respondent Kielczewski. Based on the operations described above, Respondent BE Construction has continued the employing entity and is a successor to Respondent Kielczewski. Before Respondent BE Construction purchased Respondent Kielczewski, Respondent BE Construction was put on notice of Respondent Kielczewski's actual liability in Board Case 22–CA–089865, orally, by Slawomir Kielczewski to Barbara Reed, the president and an agent of Respondent BE Construction. Based on the conduct and operations described above, Respondent BE Construction has continued the employing entity with notice of Respondent Kielczewski's actual liability to remedy its unfair labor practices, and Respondent BE Construction is a successor to Respondent Kielczewski.

CONCLUSION OF LAW

By the conduct described above, the Respondents have been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of their employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act. The unfair labor practices of the Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondents violated Section 8(a)(5) and (1) by refusing to bargain collectively and in good faith within the meaning of Section 8(d) of the Act with the unit employees' exclusive collective-bargaining representative, and by reducing unit employees' wages without giving the Union notice and opportunity to bargain over the changes, we shall order the Respondents to make the unit employees whole by paying them the amounts set forth in attachment A of the compliance specification, plus interest accrued to the date of payment at the rate prescribed in *New Horizons*, 283 NLRB 1171 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondents to compensate employees for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Regional Director for Region 22 allocating backpay to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Further, having found that the Respondents violated Section 8(a)(5) and (1) by failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of the unit within the meaning of Section 8(d) of the Act by failing to remit contributions to the Union's benefit funds, we shall order the Respondents to reinstitute payments to the benefit funds and to make the benefit funds and the unit employees whole. Specifically, we shall order the Respondents to make all such delinquent fund contributions on behalf of unit employees in the amounts set forth in attachment B of the compliance specification, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make the employees whole for any expenses they may have incurred as a result of the Respondents' failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.[5]

Having also found that the Respondents violated Section 8(a)(5) and (1) by failing and refusing to furnish information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit, we shall order the

(2003); *J. F. Morris Co.*, 292 NLRB 869, 870 fn. 2 (1989), enfd. mem. 881 F.2d 1076 (6th Cir. 1989).

[5] To the extent than an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

Respondents to provide the Union with the requested information.

Finally, having found that the Respondents violated Section 8(a)(5) and (1) by failing to recognize and refusing to bargain in good faith with the Union, we shall order the Respondents to cease and desist therefrom and to recognize and bargain with the Union on request.[6]

ORDER

The National Labor Relations Board orders that the Respondents, Environmental Contractors, Inc., Kielczewski Corporation, and BE Construction Corporation, alter egos, a single employer and/or successor, West Orange, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively and in good faith with Local 78, Laborers International Union of North America (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondents' unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time building and construction laborers employed by the Employer in the State of New Jersey, but excluding all office clerical employees, managers, guards and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on November 17, 2014.

(c) Rescind the changes in terms and conditions of employment for its unit employees that were unilaterally implemented on or after March 1, 2014.

(d) Remit to the Union's benefit funds all contributions required and due under the collective-bargaining agreement that expired on April 30, 2012, in the amounts set forth in attachment B of the compliance specification, totaling $656,690, plus any additional amounts due the funds as set forth in the remedy section of this decision.

(e) Make the unit employees whole for any loss of earnings suffered as a result of the Respondents' unilateral changes by paying them the amounts listed in attachment A of the compliance specification, totaling $820,190, plus any additional amounts due the employees as set forth in the remedy section of this decision.

(f) Compensate the affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards in the manner set forth in the remedy section of this decision, and file with the Regional Director of Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at their facility in Orange, New Jersey, copies in English, Spanish, and Polish of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In

[6] Consistent with the Board's 2014 Order discussed above as enforced by the Third Circuit, we shall order the remedial notice attached hereto as "Appendix" to be posted in English, Spanish, and Polish.

In the consolidated complaint and compliance specification, the General Counsel also requests that we order the Respondents to mail the remedial notice to all individuals employed in the unit since April 23, 2012, the date of the Union's certification. We deny this request because the General Counsel has not shown that this additional measure is needed to remedy the effects of the Respondents' unfair labor practices. See *Pro Works Contracting, Inc*., 362 NLRB No. 2, slip op. at 3 fn. 1 (2015).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

addition to such physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 1, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 19, 2018

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Marvin E. Kaplan, Chairman

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Mark Gaston Pearce, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain collectively and in good faith with Local 78, Laborers International Union of North America (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT make unilateral changes to your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time building and construction laborers employed by us in the State of New Jersey, but excluding all office clerical employees, managers, guards and supervisors as defined in the Act.

WE WILL rescind the changes in terms and conditions of employment of unit employees that were unilaterally implemented on or after March 1, 2014.

WE WILL remit to the Union's benefit funds all contributions required and due under the collective-bargaining agreement that expired on April 30, 2012, totaling $656,690, plus any additional amounts due the funds.

WE WILL make you whole for any loss of earnings attributable to the unilateral changes we have made, totaling $820,190, plus interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL furnish to the Union in a timely manner the information requested by the Union on November 17, 2014.

ENVIRONMENTAL CONTRACTORS, INC., KIELCZEWSKI CORPORATION AND THEIR ALTER EGO, SINGLE EMPLOYER, AND/OR SUCCESSOR, BE CONSTRUCTION CORPORATION

The Board's decision can be found at www.nlrb.gov/case/22-CA-089865 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.